

SERVICE DATE — AUGUST 8, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 290 (Sub-No. 381X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN
HAMILTON COUNTY, OHIO

Digest:¹ This decision allows Norfolk Southern Railway Company to end its common carrier obligation to provide freight rail service over approximately 4.10 miles of rail line in Hamilton County, Ohio.

Decided: August 4, 2016

By petition filed on April 22, 2016, Norfolk Southern Railway Company (NSR) seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 to abandon approximately 4.10 miles of rail line (the Line) extending from milepost CT 3.7 to milepost CT 7.8 in Hamilton County, Ohio. The Line traverses U.S. Postal Zip Codes 45207, 45212, 45208, 45209, 45226, and 45277. NSR also seeks an exemption from the offer of financial assistance (OFA) procedures of 49 U.S.C. § 10904 to facilitate the sale of the real estate underlying the Line to the City of Cincinnati (City) for public purposes.

Notice of the exemption was served and published in the Federal Register on May 12, 2016 (81 Fed. Reg. 29,609). No comments in opposition to the proposed abandonment were filed. For the reasons discussed below, the Board will grant exemptions from 49 U.S.C. § 10903 and 49 U.S.C. § 10904, subject to standard employee protective conditions.

BACKGROUND

According to NSR, no traffic has moved over the Line in more than five years. NSR states that there is no potential for new traffic. NSR further states it is seeking to abandon the Line and sell the property to the City for a public redevelopment project. According to NSR, the City is undertaking a plan that would reduce/reroute vehicular traffic, create greenways, and provide alternative modal access to five major development sites, including sites at Xavier

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

University and near Uptown. NSR notes that the City would take ownership of, and assume responsibility for, the safety and maintenance of the 10 bridges on the Line.

In addition to an exemption from the provisions of 49 U.S.C. § 10903, NSR also seeks an exemption from the OFA procedures of 49 U.S.C. § 10904. In support, NSR states that the Line is needed for a public purpose, as it is of critical significance to the City's redevelopment plans. NSR further asserts that there is no overriding public need for continued freight rail service.

DISCUSSION AND CONCLUSIONS

Exemption from 49 U.S.C. § 10903. Under 49 U.S.C. § 10903, a rail line may not be abandoned without the Board's prior approval. Under 49 U.S.C. § 10502, however, the Board must exempt a transaction or service from § 10903 or other provisions of Part A of Subtitle IV of Title 49 of the U.S. Code when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Here, detailed scrutiny of the proposed abandonment under 49 U.S.C. § 10903 is not necessary to carry out the RTP. NSR states that no traffic has moved over the Line in more than five years, that there is no potential for new traffic, and that it seeks to sell the property to the City for a public redevelopment project. By minimizing the administrative expense of the application process, an exemption would expedite regulatory decisions and reduce regulatory barriers to exit. 49 U.S.C. §§ 10101(2), (7), (15). Additionally, granting NSR's petition would foster sound economic conditions and would encourage efficient management by allowing NSR to rationalize underutilized assets and transfer them for use by others in further economic development for the community. 49 U.S.C. §§ 10101(5) & (9). Other aspects of the RTP would not be adversely affected by the use of the exemption process.

We also find that regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power.² As discussed earlier, no traffic has moved over the Line in more than five years, and NSR further states that there is no potential for new traffic.

Exemption from 49 U.S.C. § 10904. Under 49 U.S.C. § 10904, a financially responsible person may offer to purchase, or subsidize continued rail operation over, a rail line sought to be abandoned. The Board has granted exemptions from the OFA provisions of 49 U.S.C. § 10904 when the record shows that the right-of-way is needed for a valid public purpose and there is no overriding public need for continued freight rail service. See, e.g., Union Pac. R.R.—Aban. Exemption—in Adams, Weld, & Boulder Ctys., Colo., AB 33 (Sub-No. 307X), slip op. at 2 (STB served Oct. 18, 2012).

² Because we find that regulation of the proposed abandonment is not necessary to protect shippers from the abuse of market power, we need not determine whether the proposed abandonment is limited in scope.

NSR has justified an exemption from the OFA process. First, NSR has demonstrated that the Line is needed for a valid purpose: the real estate underlying the Line will be used by the City for a plan that would reduce/reroute vehicular traffic, create greenways, and provide alternative modal access to five major development sites. The Board has previously granted an exemption from the OFA process for multi-purpose improvements to a downtown area. See, e.g., Norfolk & W. Ry.—Aban. Exemption—in Cincinnati, Hamilton Cty., Ohio, AB 290 (Sub-No. 184X), slip op. at 9 (STB served May 13, 1998). Additionally, there is no overriding public need for continued rail service, as there is no current traffic on the Line and NSR states that there is no potential for new traffic. Thus, we conclude that applying the OFA provisions in this situation is not necessary to carry out the RTP. Applying the OFA statute here is also not necessary to protect shippers on the Line from the abuse of market power, as there has been no traffic on the Line in more than five years. The record establishes that the proposed exemption from 49 U.S.C. § 10904 meets the exemption criteria of 49 U.S.C. § 10502.

Employee Protection. Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose on NSR the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho (Oregon Short Line), 360 I.C.C. 91 (1979).

Environmental and Historic Review. NSR has submitted a combined environmental and historic report with its petition and has notified the appropriate federal, state, and local agencies of the opportunity to submit information concerning the environmental impacts of the proposed abandonment. See 49 C.F.R. §§ 1105.7, 1105.8, & 1105.11. The Board's Office of Environmental Analysis (OEA) examined the report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment.

In an Environmental Assessment (EA) issued on June 21, 2016, OEA concluded that, as proposed, the abandonment of the Line would not significantly affect the quality of the human environment and recommended that no environmental conditions be imposed on any decision granting abandonment authority.

NSR submitted a historic report as required by the Board's environmental rules, 49 C.F.R. § 1105.8(a), and served the report on the Ohio State Historic Preservation Office (SHPO) pursuant to 49 C.F.R. § 1105.8(c). The SHPO provided its opinion regarding potential effects to historic properties for this undertaking pursuant to Section 106 regulations of the National Historic Preservation Act, 54 U.S.C. § 306108. In its comments, the SHPO writes that the proposed abandonment would have no effect on any significant historic properties within or near the project. The SHPO stated that no further coordination with its office is necessary. OEA has therefore determined that the proposed abandonment, as currently described, would not affect historic properties as defined at 36 C.F.R. § 800.3(a)(1). Pursuant to 36 C.F.R. § 800.2, OEA conducted a search of the Native American Consultation Database to identify federally-recognized tribes that may have ancestral connections to the area. The database identified the Delaware Nation, Oklahoma, the Miami Tribe of Oklahoma and the Peoria Tribe of Indians of

Oklahoma as having a possible interest in the project area. OEA provided a copy of the EA to the above tribes for comment.

Comments on the EA were due by July 21, 2016, and no comments were filed. OEA issued a Final EA on July 26, 2016, that does not recommend any environmental or historic preservation conditions. We agree with OEA's analysis and recommendations and will not impose environmental or historic preservation conditions.

This action will not significantly impact the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. § 10502, we exempt from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by NSR of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line.
2. NSR's request for exemption from the provisions of 49 U.S.C. § 10904 is granted.
3. Petitions to stay must be filed by August 18, 2016. Petitions to reopen must be filed by August 29, 2016.
4. This exemption will be effective on September 7, 2016.
5. Pursuant to 49 C.F.R. § 1152.29(e)(2), NSR shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by NSR's filing of a notice of consummation by August 8, 2017, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the one-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.